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No. 10-511

IN THE
Supreme Court of the United States

HARRY R. JACKSON, JR., et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS and DISTRICT OF COLUMBIA,

Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

Barely two pages into their response, Respondents make some extraordinary statements demonstrating not only the federal importance of this matter, but also the egregious error of the D.C. Court of Appeals. Like the D.C. Court of Appeals, Respondents state that the D.C. Charter as amended is the exclusive product of the Council, without any regard for Congress's affirmative role in the process. Resp. at 11, 19, 20. Yet, like state and territorial legislatures, the Council cannot alter its own organic act without the concurrence of Congress. Nor can the Council claim ultimate ownership of an amendment to the Charter, which could only become law through the approving nod of Congress. But Respondents assert as relevant to the interpretation of the Charter only the purported intent, beliefs, and desires of the Council, to the exclusion of Congress and the District's citizens. Not only does this position challenge Congress's constitutional authority over the District, it also undermines the bedrock nature of organic and enabling acts themselves, which are "fundamental" laws, required to establish every state, territory, and even the government of the District. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 625 (1989); *Springer v. Government of Philippine Islands*, 277 U.S. 189, 200 (1928). This faulty legal position, adopted by the D.C. Court of Appeals and trumpeted by Respondents, demonstrates the need for review and intervention by this Court.

I. IMPORTANT FEDERAL INTERESTS ARE PRESENTED IN THIS CASE.

The *federal* (not "national," as asserted by Respondents) interests involved here go well beyond the already-existent "increased lobbying of Congress" on the issues raised herein.[1] Resp. at 13. Congress's express and primary federal interest in enacting the D.C. Charter was to "relieve [itself] of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). Congress furthered this very interest by subsequently enacting the people's broad right of initiative,[2] allowing greater checks,

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[1] While Respondents dismiss as insignificant the congressional resolutions proposed in response to the District's marriage-related legislation, they conveniently spend little time discussing the independently proposed legislation designed to allow the people to vote directly on marriage-related issues. These independent bills are the product of the HRA restriction and tangibly demonstrate that the D.C. Court of Appeals' decision undermines the federal interest in freeing Congress to address federal issues.

[2] Respondents' attempts to minimize Congress's broad grant of initiative powers to the District's citizens are unavailing. Respondents' contention that the HRA restriction is "only one of numerous substantive restrictions on the right of initiative," Resp. at 9-10, is misleading since the other restrictions cited by Respondents define the scope of legislative power upon the D.C. government as a whole, and not just the initiative right. But unlike these other restrictions, the HRA restriction embodies the Council's attempt to remove from its co-equal legislative branch—the people—congressionally granted power through an infinitely malleable mechanism by which the Council may continually decrease the people's right to check and balance the Council's enactments. The mere existence of such a limitless legislative instrument that can be used to undermine congressionally granted rights is a significant federal interest that warrants this Court's corrective attention.

balances, and opportunities for the people and their elected representatives to work out issues within the District for themselves. Thus, federal interests are present and congressional intent is inextricable to the question presented.

A. The Charter As Amended Is A Congressional Enactment.

The crux of Respondents' argument on why this Court should deny review rests on an important factual flaw, which, if left unanswered, would undermine Congress's constitutional authority over the ongoing affairs of the District. While initially paying homage to Congress's authority over the District, Respondents contend that the D.C. Charter as amended is *the sole and exclusive product of the Council.* Resp. at 11, 19, 20. And though they are forced to acknowledge that the Charter could not be amended without the express approval of Congress,[3] Respondents dismiss outright any importance attributable to Congress's necessary act in amending the D.C. Charter, failing even to respond to Petitioners' arguments in that regard. Pet. at 14. Notably, before this case, the D.C. Court of Appeals expressly acknowledged Congress's indelible link to the meaning and interpretation of the Charter. *See Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 7 (D.C. 1991) ("Since amendments to the Charter required [c]ongressional approval when the initiative

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[3] At the time the D.C. Charter was amended to include the people's rights of initiative and referendum, the Home Rule Act required Congress to "adopt a concurrent resolution . . . approving" any proposed amendment to the Charter. D.C. Code § 1-125(b) (1977 Supp.).

right was approved by Congress, the court must consider [c]ongressional intent in approving the amendment.") (citation omitted). But here, the import of that link is ignored—indeed, outright rejected—by Respondents and the D.C. Court of Appeals.

Respondents' attempt to elevate the Council over Congress falls flat for another reason—Congress, unlike the Council, is the only indispensible party to the Charter amendments at issue here. Congress, on the one hand, can directly amend the District's Charter. And on the other hand, Congress can approve a proposed amendment offered to it by the voters of the District. That the amendment at issue here was the product of a District-wide vote, subsequently presented to Congress for approval, and not initially conceived by Congress, does not undermine Congress's preeminent role over the Charter. *No matter what method of amending the Charter is employed, Congress is the only legislative body indispensable to them all.* Thus, in all respects and circumstances, Congress is the ultimate author and source of authority for the Charter and the pertinent amendments thereto. The D.C. Court of Appeal's failure to acknowledge this reality,[4] and its exclusive focus on how the Council interpreted the Charter and its amendments, is egregious error.

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[4] The five-member majority of the D.C. Court of Appeals, on 18 counted occasions, looked at the intent of the Council regarding the amendment of the Charter, without ever once discussing the intent of the only legislative body without whom the Charter could not be amended—Congress.

B. The Impact of the HRA Restriction Is Not Speculative, But A Broad and Existent Alteration of the Congressionally Constructed Balance of Legislative Power In the District.

Respondents attempt to mislead this Court by asserting that "the Council in the three decades after the IPA has never adopted another substantive limitation." Resp. at 16. Yet, by expressly incorporating the HRA into the IPA, every time the HRA is amended the substance and meaning of the IPA is also amended. This is significant, not just because of the potential for mischief, but because the HRA is both substantially broad and ever growing. *See* Pet. at 17-20. For example, the District's definition of "public accommodation" under the HRA is exceptionally comprehensive. *See* D.C. Code § 2-1401.02(24) (listing more than 60 categories of entities, including all "establishments dealing with goods or services of any kind," that constitute public accommodations under D.C. law). Compared to its counterpart in federal law, *see, e.g.*, 42 U.S.C. § 2000a(b)(1)-(4), the District's HRA is unparalleled in both its current breadth and history of growth.

Tellingly, aside from blanket assertions, Respondents are unable to dispute the magnitude of the HRA restriction. They claim, for instance, that "[i]t is . . . simply not true that . . . the [HRA] safeguard 'would likely prevent the people from proposing any statute that treats homeowners more favorably than renters, or persons residing in the District more favorably than persons residing outside the District,'" Resp. at 15, but they provide

no reason why that is so. To the contrary, such laws are directly precluded by the HRA's prohibition on "place-of-residence" discrimination, particularly in the housing context. These are just a few of the many examples in which the HRA restriction precludes the District's citizens from legislating on measures authorized for their consideration by Congress.

Realizing that the legislative mechanism now approved by the D.C. Court of Appeals is an extremely slippery slope, Respondents focus on the temporal proximity between Congress's enactment of the initiative right and the Council's enactment of the IPA, attempting to "lock in" a limited scope of initiative limitations. Resp. at 16. But this attempted rationale for the status quo fails to recognize two key points. First, it ignores the cavalier attitude of the Council in enacting the HRA restriction against the legal opinions of both its General Counsel and Corporation Counsel. *See* Pet. at 6-7 n.4. Second, in the event that the Council's attitude regarding the people's legislative rights remains less than reverent, Respondents advocate that this Court should "trust" the D.C. Court of Appeals to keep the playing field level. Resp. at 15. But considering how the D.C. Court of Appeals addressed the question herein, yielding all intent and deference to the Council, and none to the intent of the voters or Congress, this Court possesses no basis upon which to conclude that the D.C. Court of Appeals can be "trusted" to guard the people's legislative rights, much less to consider the intent of the Congress that created the right at issue.

C. The Intent of Congress in Interpreting Organic Acts and Other Fundamental Laws Has Regularly Required This Court's Attention.

In an effort to avoid the important federal interests implicated in this matter, Respondents deny that the Home Rule Act is an organic act for the District. Resp. at 20. This is a curious assertion because the Home Rule Act undeniably supplanted the "District of Columbia Organic Act of 1871," which had previously replaced the "District of Columbia Organic Act of 1801." *See* District of Columbia Organic Act of 1801, 2 Stat. 103 (1801); District of Columbia Organic Act of 1871, 16 Stat. 419 (1871).

This Court has consistently sought to uphold the congressional intent attached to organic acts, especially where, as here, local matters are working "to destroy the government which it was its purpose to create." *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 277 (1913) (restoring Congress's intent for Puerto Rico's organic act concerning the issue of sovereign immunity). Here, as demonstrated by the plain language of the Home Rule Act and its amendments, Congress sought to create co-equal (save one express exception) legislative bodies within the District. It cannot, therefore, follow that Congress intended to grant one legislative body the right to define the legislative boundaries of the other. And because the D.C. Court of Appeals has condoned this result, the District's Home Rule Act now requires review by this Court.

II. Deference To the D.C. Court of Appeals Is Inappropriate.

A. This Case Involves Federal Interests; It Does Not Present a Matter of Exclusively Local Concern.

This Court has made clear that its deference to D.C. and territorial courts applies only in limited circumstances—where cases involve issues that are "exclusively" or "purely" of local concern. *See Whalen v. United States*, 445 U.S. 684, 687 (1980); *Limtiaco v. Camacho*, 549 U.S. 483, 491-92 (2007). But Respondents have failed to show, as they must, that *no* federal interests are involved here. Indeed, Congress has expressly stated the federal interest in "reliev[ing] [itself] of the burden of legislating upon essentially local District matters," D.C. Code § 1-201.02(a), an interest directly furthered by the people's initiative power. Respondents attempt to minimize the federal interest by characterizing it as a mere interest in "limiting the lobbying Congress receives regarding District matters," Resp. at 18, rather than the congressionally identified (and more inclusive) process of "legislating upon" District matters. But their arguments do not shake the fact that federal interests are involved here, and thus this case does not involve matters of *exclusively* local concern. As a result, deference is not warranted.

Respondents nevertheless try to limit the avenues through which this Court should identify a non-local concern, claiming that the Court should look only to "the subject matter of the case." Resp. at 19. But this Court has never expressed such a

limitation. *In re Sawyer*, 360 U.S. 622 (1959), plainly shows that a case's subject matter is not the only consideration when identifying a local interest. *Sawyer* involved the subject matter of attorney discipline—a matter of indisputably local concern, *see Leis v. Flynt*, 439 U.S. 438, 442 (1979)—but this Court declined to defer there, thus exposing the plain error of Respondents' asserted standard. In any event, the subject matter of this case involves the division of legislative power in the District, and it is clear that Congress implemented that division of power to advance the federal interest of "reliev[ing] [itself] of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). Thus, even under Respondents' erroneous standard, it is inescapable that a federal interest is involved here, and deference is not warranted.

But even if this case involved matters of exclusively local concern, deference would not apply here. It has been the practice of this Court to defer to the District's *courts* when they have engaged in careful judicial analysis, *see Whalen*, 445 U.S. at 687; here, however, the District's courts have merely rubber-stamped the *Council's interpretation* of the Charter (as evidenced through the IPA), without regard for Congress's intent. This Court should not take its policy of deference to the District's courts and extend it into a novel policy of deference to the legal interpretation of the District's Council—particularly an interpretation that was uniformly contradicted by both its General Counsel and Corporation Counsel. *See* Pet. at 6-7 n.4.

B. The D.C. Court of Appeals Committed Egregious Error.

Respondents claim that the D.C. Court of Appeals, by focusing solely on the Council's intent, did not commit egregious error because (1) "the court was correct to focus on the Council['s]" intent and (2) "[P]etitioners fail to show that Congress and the voters who approved the [Charter amendment] had any different intent." Resp. at 22-23. But Respondents' argument fails on both counts. First, it is undisputed that, as to this particular Council-initiated amendment to the Charter, affirmative approval of both the people and Congress was required. Without the approval of those parties, the specific initiative right at issue here would not exist. The intent of a necessary party, without question, is relevant to determine the enactment's intent. *See Hessey*, 601 A.2d at 7. Indeed, as demonstrated above, the intent of Congress, the ultimate approver of the Charter and its amendments, is preeminent over the intent of the Council.

Second, Respondents refuse to look to the most readily apparent and reliable source for determining the people's and Congress's intent—the unambiguous and plain language of the Charter itself. The text of the Charter at issue contains only one substantive limitation on the people's initiative right: the exclusion of "laws appropriating funds." D.C. Code § 1-204.101(a). Courts have recognized that the plain text of a popularly enacted measure is the primary source—not to mention one of the only legitimate sources—for "discern[ing] the people's intent in passing the measure." *See, e.g., Jones v.*

Bates, 127 F.3d 839, 860 (9th Cir. 1997). And it logically follows that the plain text of the Charter amendment is also the best source for determining Congress's intent. Here, as evidenced by the statutory language, both the voters and Congress reasonably believed that the restriction on "laws appropriating funds" was the only substantive difference between the legislative power delegated to the people and that granted to the Council. Indeed, the extensive legislative history contained within the Congressional Record, *see, e.g.*, Pet. at 5, 14, 19, 27, 28, confirms that Congress did not intend that the people's right to legislate be hampered by additional limitations, much less a permanent tool (the HRA restriction) through which the people's legislative power could be further restricted by their co-legislators—the Council.

In their attempted defense of the D.C. Court of Appeals' decision, Respondents also offer an unsupported and exceedingly narrow reading of that court's discussion of Section 752 of the Home Rule Act. Resp. at 11-12, 26. The D.C. Court of Appeals did not, as Respondents claim, limit its holding regarding Section 752 to "overcome the argument that the Council could not order the Board, an independent agency, to do anything." Resp. at 12. In fact, the portion of the opinion Respondents cite, when read in context, actually supports Petitioners' position: "We interpret [S]ection 752 to confer upon the Council *the authority to enact laws giving direction to the Board in the handling of election matters*, notwithstanding the Board's status as an independent agency." Pet. at 53a (emphasis added).

Other portions of the D.C. Court of Appeals' decision further demonstrate that the court's use of Section 752 was not limited as Respondents claim. For instance, that court said: "[T]he legislative history of the Home Rule Act suggests strongly that, through [S]ection 752, Congress intended to give the Council *authority to legislate on substantive matters regarding elections* (and not merely to establish procedures)." Pet. at 51a (emphasis added). The Council itself, when enacting the IPA, viewed Section 752 as the far-reaching grant of power that the majority wrongly interpreted it to be; indeed, the Council said that "legal support" for the HRA restriction is "found in [Section 752], which grant[s] the Council plenary authority over all election matters." Pet. at 53a-54a (alterations in original). The D.C. Court of Appeals thus explicitly endorsed and adopted that "plenary power" understanding of Section 752, and its decision amounts to an egregious error demanding this Court's review.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review.

Respectfully submitted,

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